2009

# Gilbert Development Corporation v. Wardley Corporation : Brief of Appellant

Utah Court of Appeals

**IN THE UTAH COURT OF APPEALS**

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| GILBERT DEVELOPMENT CORPORATION,<br><br>Plaintiff/Appellant,<br>v.<br><br>WARDLEY CORPORATION; DON GRYMES; TERRY LOCICERO; LLOYD MELLING; and CHAD RIDDLE,<br><br>Defendants/Appellees. | Case No. 20090358-CA |

On appeal from a judgment of the Fifth District Court for Washington County
The Honorable G. Rand Beacham

# BRIEF FOR APPELLANT


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## RULE 24(a)(1) STATEMENT OF PARTIES

The caption of the case does not contain the names of all parties to the proceeding before the district court; therefore, in accordance with Utah R. App. P. 24(a)(1), such parties are listed separately as follows:

Plaintiff:

Gilbert Development Corporation

Defendants:

Southern Utah Title Company, a Utah Company

Wardley Better Homes & Gardens, a Utah Corporation

Terry Lo Cicero, an individual

Coldwell Banker Commercial Premier Realty-St. George, a Utah Company

Don Grymes, an individual

Lloyd Melling, an individual

Chad Riddle, an individual

Guardian Title Insurance Agency of Southern Utah, Inc.101695, a Utah Company

Boyd Ray Hepworth, an individual

April Hepworth, an individual

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## JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78A-4-103(j).

## ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court erred in granting a directed verdict for the Wardley Defendants on Plaintiff Gilbert Development Corporation's fraud claim, thus depriving Gilbert Development of having the jury decide the issue based on the evidence presented at trial.

**Standard of Review**. A directed verdict may only be affirmed if "after 'examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor.'" Daines v. Vincent, 2008 UT 51, ¶20, 190 P.3d 1269 (quoting Merino v. Albertsons, Inc., 1999 UT 14, ¶3, 975 P.2d 467). A directed verdict cannot be sustained "if reasonable minds could disagree with the ground asserted for directing a verdict." Mahmood v. Ross, 1999 UT 104, ¶18, 990 P.2d 933.

**Preservation.** This issue was preserved below at RT. VI at 204-232.

2. If this Court affirms the trial court's directed verdict, the second issue on appeal is whether the trial court's award of attorney fees was reasonable. Specifically:

(a) whether the trial court erred in awarding fees for an unsuccessful motion for summary judgment, including an award of fees for a summary judgment motion that was subsequently withdrawn;

(b) whether the trial court erred in holding that the entire State of Utah constitutes the "locality" in determining whether the fees charged by the Wardley Defendants' attorneys were consistent with the rate charged in the "locality" when the undisputed evidence before the trial court showed a stark contrast in St. George vs. Salt Lake City rates;

(b) whether the trial court erred in awarding attorney fees incurred for work that was duplicated or otherwise generated as a result of a transition of the case between law firms;

(c) whether the trial court erred in awarding fees for time spent in mock trial where there was no showing that the mock trial was necessary and reasonable as opposed to excessive preparation; and

(d) whether the trial court erred in refusing to reduce the claimed fees to account for an apportionment between compensable and non-compensable claims.

**Standard of Review.** "Calculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988-89 (Utah 1988) (citations omitted). Nevertheless, "an award of attorney fees must be supported by evidence in the record." Id. at 989.

**Preservation.** This issue was preserved below at R. 2072-2091.

## DETERMINATIVE REGULATIONS

Administrative regulations of central importance to this appeal are Utah Admin. Code R162-6.2.15, which is attached at Addendum 1.

## STATEMENT OF THE CASE

### I. NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.

This case arises out of a real estate transaction in which the real estate agents involved, all of whom were affiliated with the real estate brokerage Wardley Better Homes & Gardens, concealed material information from Appellant Gilbert Development Corporation ("GDC") in order to convince GDC to provide seller financing to the buyer of the property that Wardley was listing for GDC. The buyer soon defaulted on his note to GDC, which caused GDC considerable damage, all of which could have been avoided had the agents fully informed GDC to enable it to make an informed decision on seller financing the buyer's purchase of its property. GDC sued Wardley and the agents (collectively the "Wardley Defendants") for fraud, among other claims.

After a seven day jury trial, the Wardley Defendants moved for and obtained a directed verdict on the fraud claims. The remaining claims went to the jury which returned a special verdict for the Wardley Defendants. The trial court thereafter entered judgment for the Wardley Defendants and awarded them nearly $400,000 in attorney fees. GDC has timely appealed.

## II. STATEMENT OF FACTS[1]

### A. Zion View Estates

Gilbert Development Corporation ("GDC") is in the business of performing general contracting activities such as asphalt paving, grading, earth work, and installing underground utilities. [RT. II at 88:15-25.] GDC's president and majority owner is Steve Gilbert. [RT. II at 88:15-21.] In the early 1990s, GDC purchased approximately 75 acres of undeveloped property in LaVerkin, Utah known as Zion View Estates ("ZVE"). [RT. II at 88:15-21; 91-92.] Initially, GDC planned on developing ZVE itself. [RT. II at 103; Trial Ex. 3.] To that end, GDC investigated manufactured homes as a possible product for ZVE and ultimately entered into a business relationship with Dave Wright (the sole proprietor of a company called Capital Housing) wherein GDC would provide lots at ZVE and Capital Housing would market and sell manufactured homes to potential purchasers. [RT. II at 96-101; Trial Exs. 1 & 2.]

Doing business with Wright was a decision GDC would soon regret. [RT. II at 104-107; III at 49-50.] Wright installed homes at ZVE that were not approved, and, in fact, were expressly rejected by GDC. [RT. II at 104.] There were also numerous structural problems with the homes Wright installed at ZVE, including the inability to open doors, sagging floors, cracked ceilings, no landscaping, no water heaters, exposed wires, lack of certificates of occupancy, improper installation of footings, and improperly

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[1] Because this is an appeal from a directed verdict, the evidence at trial is recited in a light most favorable to the non-moving party. See Daines v. Vincent, 2008 UT 51, ¶20, 190 P.3d 1269.

installed sewer lines (causing sewage to be discharged beneath the home). [RT. II at 105-107.] These numerous problems ultimately led Gilbert to the conclusion that Wright was dishonest, untrustworthy and someone with whom he no longer desired to do business. Moreover, after terminating the relationship with Wright, GDC decided to sell ZVE rather than try to develop it. [RT. III at 49-50, 112-114].

**B. Wardley**

In July 1999, GDC entered into a listing agreement with Wardley Better Homes & Gardens ("Wardley") to list and sell ZVE and Wardley agents Karen Fuller and Terry LoCicero became the seller's agents for the sale. [RT. II at 114; Trial Ex. 8.] Wardley agents Chad Riddle and Lloyd Melling ultimately became the buyer's agents for this transaction. [RT. IV at 147-148.] Thus, the agents on both sides of the ZVE transaction were all under the Wardley roof. [Trial Ex. 11; RT. III at 216, 220, 231; Trial Ex. 38.] Don Grymes was the broker for Wardley's St. George office and was responsible for the conduct of all of these agents. He was also a limited agent for GDC [RT. II at 119; III at 214-216.]

When GDC listed ZVE, Gilbert suspected that Wright may still be interested in the property. [RT. III at 56.] Gilbert told Fuller and LoCicero that he did not trust or like Wright and that he "didn't want to have anything to do with [him]." [RT. IV at 142-143, 176-177.] Gilbert also made it clear that GDC would not consider or provide seller financing if Wright was involved in any way on the other side of the transaction. [RT. II at 135-136; III at 52-55; IV at 146, 176-177.]

### C. The Offer and Negotiations

Shortly after listing ZVE, Wardley agents Riddle and Melling presented Fuller with an offer from an entity known as Mobile Mansions. [RT. IV at 147-148.] Fuller conveyed the offer to GDC, which was rejected as Gilbert wanted to deal with an individual rather than a corporation. [RT. IV at 147-148.] Shortly thereafter, in August 1999, Riddle and Melling conveyed a $1.2 million cash offer from Henry Butterfield. [Trial Ex. 11; RT. II at 121; 130-133.] GDC and Butterfield ultimately settled on a $1.6 million cash purchase price with a $100,000 non-refundable deposit. [Trial Ex. 11; RT. II at 140-141.] The Wardley agents conducted all negotiations and Gilbert never met or spoke with Butterfield. [RT. II at 140-141.] As it would turn out, the Wardley agents had not met Butterfield either; rather, it was Butterfield's long time friend, Dave Wright, who worked with Riddle and Melling to put the deal together. [RT. IV at 5, 9-16; IV 228-239, 244; V at 24-25.]

In reality, it was Wright's idea that Butterfield should purchase and develop ZVE. [RT. IV at 218-219.] Butterfield had no knowledge of the property. [RT. V at 22-23.] In fact, prior to closing the sale Butterfield never even visited the property. [RT. V at 20.] Wright initially called Wardley and spoke with Riddle about the purchase of ZVE and Riddle and Melling dealt almost exclusively with Wright reviewing agreements, discussing terms, and seeking his instruction. [RT. IV at 5-12, 28-33; IV at 69-71.] At times, the Wardly agents even conducted these meetings at Wright's office at Capital Housing. [RT. IV at 12-13.]

Importantly, Riddle and Melling knew Gilbert's opinion of Wright and were adamant that no word of Wright's involvement could get back to Gilbert. [RT. IV at 228-235.] Indeed, Wright testified Riddle and Melling told him:

> That if Steve Gilbert had word that Dave Wright was involved in this deal, this deal wouldn't happen, period, and we were looking at losing $100,000 [in commissions]-- losing a project. So I just bit my tongue, and the papers would go down to [Butterfield], and we would go over them anyway.

[RT. IV at 232:15-19, 22.] Indeed, Gilbert's previous experience with Wright had taught him "that if [Wright] did get involved, that the odds of [GDC] ending up in bankruptcy or foreclosure was almost absolute." [RT. II at 161:23-25, 162:1-3.]

Butterfield ultimately failed to meet the closing deadline for the purchase of ZVE and, in November 1999, GDC requested a release of the earnest money deposit. [Trial Ex. 25; RT. II at 141-143.] In response, an attorney named Bruce Jenkins sent a letter to Melling on behalf of Mobile Mansions, Inc. [Trial Ex. 26.] Butterfield owned Mobile Mansions and pursuant to a "Dealer Management Agreement" between Mobile Mansions and Wright, Wright was responsible for all day-to-day operations of Mobile Mansions and received $30,000 per month as compensation. [Trial Ex. 19.]

In the letter, Jenkins claimed that Mobile Mansions—not GDC—was entitled to the $100,000 deposit, and demanded mandatory arbitration pursuant to the purchase agreement. [Trial Ex. 26.] Therefore, an arbitration to take place at Wardley's offices was scheduled. [RT. II at 144-146; Trial Ex. 28.] GDC had never heard of Mobile Mansions, as that entity was not referenced in the purchase agreement. [RT. II at 121, 192; Trial Ex. 11.] Nevertheless, in Grymes' notice of arbitration to GDC and

accompanying letter, Grymes did not mention Mobile Mansions. [Trial Ex. 28.] Unbeknownst to GDC, however, Wright had personally delivered the $100,000 earnest money deposit to Wardley in the form of two Mobile Mansion checks for $10,000 and $90,000 respectively, written to Wardley. [RT. IV at 233; Trial Exs. 14 & 15.]

The arbitration took place on December 13, 1999. [RT. II at 146.] The Wardley agents (Fuller, LoCicero, Riddle, and Melling) and their broker (Grymes) all attended. [RT. II at 147-149.] Gilbert attended for GDC but Butterfield was not present. [RT. II at 147-150.] Instead, Gilbert was told that Butterfield was represented by attorney Jenkins. [RT. II at 147-150.] It soon became clear that, rather than determine entitlement to the deposit, the primary purpose of the arbitration was to salvage the ZVE sale. [RT. II at 150.] Since GDC was not looking for a "gift" in the form of the deposit, it was willing to entertain putting the deal back together. [RT. II at 150:11-24.]

Butterfield's absence concerned Gilbert, however, as it was unclear who was involved on the other side of the transaction. [RT. II at 150:25, 151:1-5.] Gilbert expressed this concern to Grymes who reassured Gilbert that Butterfield was the only one involved on the buyer's side. [RT. II at 150:25, 151:1-5.] Grymes did not mention Mobile Mansions, despite his knowledge that Jenkins sent the arbitration demand on behalf of Mobile Mansions and despite the fact that Mobile Mansions, through Wright, deposited the earnest money. [Trial Exs. 14, 15, 26 & 28.]

When Grymes suggested seller financing as a way to salvage the sale, Gilbert repeated that seller financing was not an option if Wright was involved with the

transaction in any way, including involvement with the purchaser. [RT. II at 151-154, 159, 162.] Simply put, if GDC had known that Wright was involved, GDC would not have provided seller financing because it knew that Wright's involvement would lead to inevitable foreclosure. [RT. II at 161:23-25, 162:1-3.]

From conversations with Melling and with Wright himself, Grymes knew that Wright had played a significant role in the transaction. [RT. IV at 74-75; 222-224.] Despite that knowledge, Grymes reassured Gilbert that he had no knowledge of anyone being involved other than Butterfield. [RT. II at 152:1-5.] Indeed, despite Wright's deep involvement in the transaction, during the course of the arbitration, negotiations, and dealings with the Wardley agents, not one of the agents or their broker mentioned any of the facts that they knew would be material to Gilbert – that Wright had indeed been a part of the transaction. [RT. II at 160-164.]

Given Grymes' assurance and the Wardley agents' silence, GDC agreed to restructure the agreement with Butterfield, which resulted in a second purchase agreement. [Trial Ex. 36; RT. II at 155-56.] Under the terms of that agreement, the purchase price for ZVE was $1.6 million; GDC was to receive the $100,000 deposit being held by Wardley and an additional $400,000 cash at closing; and GDC agreed to seller finance the remaining $1.1 million. [Trial Ex. 36.] If Gilbert had known what the Wardley Defendants knew and failed to disclose, GDC never would have seller financed Butterfield's purchase of the property. [RT. III at 22-23.]

Indeed, before the sale closed, when Gilbert heard a mere rumor that Wright was selling lots on ZVE and that there was a possibility that Wright was "weaseling in on this deal" he immediately called Fuller and LoCicero and reiterated that if Wright was involved, the deal was off. [RT. II at 199.] Both advised Gilbert that they would check on whether Wright was involved and to see if there was any truth to the rumor. [RT. II at 199-200.] Fuller approached Riddle and Melling about the issue. [RT. IV at 154-155.] They did not deny Wright's involvement but, instead, told her that she could not prove it. [RT. IV at 154-155.] Fuller then went to Grymes, who echoed Melling and Riddle, stating that it would be in her best interest not to pursue the issue of Wright's involvement. [RT. IV at 157.]

Having not heard back from Fuller, GDC closed the ZVE sale on January 13, 2000. [Trial Ex. 44.] In exchange for a trust deed note from Butterfield which was secured by a trust deed recorded against lots in ZVE, GDC conveyed its interest in ZVE to Butterfield. [Trial Exs. 41, 42 & 107; RT. II at 177-178.] Wardley received a $96,000 commission (paid by GDC from the sale proceeds paid at closing) – the largest commission that Wardley's St. George office had received during Grymes' tenure as branch broker. [Trial Ex. 44; RT. II at 174, 212:24, 213:1-4.]

### D. Butterfield's Default, GDC's Attempted Foreclosure, and Wright's Surfacing.

Southern Utah Title Company serviced the note as escrow agent. [RT. II at 179-181.] Butterfield was to send payments to Southern Utah Title, which would then issue a check to GDC representing those payments. [RT. II at 179-181.] As a result, GDC had

no knowledge that it was actually Mobile Mansions, Wright, and Capital Housing that sent payments to Southern Utah Title. [RT. II at 179-181, 195.]

GDC received only four quarterly interest payments on the note through checks issued by Southern Utah Title. [RT. II at 178-181.] On March 19, 2001, GDC sent written notice of default to Butterfield. [Trial Ex. 60; RT. II at 182.] Shortly before sending the notice, Gilbert received a message that Wright had called in reference to the transaction. [RT. II at 184.] Still in the dark with respect to Wright's involvement, Gilbert stated in his letter to Butterfield that Wright claimed to be negotiating on Butterfield's behalf but that Wright had "no legal or financial involvement with the issues discussed between us." [RT. II at 183; Trial Ex. 60.] Butterfield failed to cure his default and GDC started foreclosure proceedings. [RT. II at 185-190; Trial Exs. 61 & 62.]

GDC's efforts to foreclose on the ZVE property came to a grinding and unexpected halt when GDC was sued by a California bankruptcy trustee for fraudulent transfer. [RT. II at 190-191; Trial Ex. 70.] Mobile Mansions had filed a Chapter 7 bankruptcy case in California and the trustee asserted that Mobile Mansions made fraudulent transfers by paying GDC for the purchase of Butterfield's lots at ZVE. [Trial Ex. 70.] The trustee sought nearly one million dollars and the return of the ZVE lots. [Trial Ex. 70; RT. II at 194.] This was the first time that Gilbert had heard of Mobile Mansions and it was at this point that Gilbert finally realized that Wright was involved in the transaction. [RT. II at 192, 197.]

GDC was forced to retain counsel in California and defended the fraudulent transfer case for approximately two years. [RT. III at 4-6.] After spending nearly $600,000 in legal fees, GDC obtained a dismissal of that case. [RT. III at 5-6.] Nevertheless, had the Wardley agents or Grymes informed Gilbert of Wright's involvement from the outset he never would have entered into the transaction with Butterfield. [RT. III at 22-25.] Indeed, Gilbert's fears, expressed at the December 13 arbitration, proved to be prophetic. [RT. III at 22-25.]

**E. The Litigation**

On April 10, 2003, GDC filed suit against, inter alia, Wardley and its agents LoCicero, Melling, and Riddle, and their broker Grymes (collectively referred to as the "Wardley Defendants"). GDC asserted claims for, inter alia, breach of contract and fraud. [R. 1-63.] After a seven-day jury trial, the Wardley Defendants moved for a directed verdict on all remaining claims [RT. VI at 204-232.] The trial court granted the motion with respect to the fraud claims, reasoning:

> To cut to the chase, I do not find sufficient evidence of intent to defraud. The nearest I find to that under the requirement of clear and convincing is the conversation between Mr. Grymes and Ms. [LoCicero], and then the knowledge acquired by Mr. Melling and Mr. Riddle.
>
> With respect to Mr. Grymes and Ms. [LoCicero], I don't find that a reasonable juror could conclude that the failure to disclose a hunch or intuition or suspicion, which admittedly was without particular evidence, would equal an intent to defraud by either Mr. Grymes or Ms. Fuller sufficient to meet the clear and convincing evidence standard.
>
> With respect to Mr. Melling and Mr. Riddle, I find the duty to disclose -- their duty to disclose to the plaintiff not sufficiently clear that a reasonable juror could conclude that failure to disclose constituted clear and convincing evidence of an

> intent to defraud. I just don't think a reasonable juror would find that, and so the motion is granted as to fraud and conspiracy to commit fraud.
>
> With respect to punitive damages, this also would require clear and convincing proof of willful and malicious conduct or intentionally fraudulent conduct, or knowingly -- knowing and reckless indifference to the rights of plaintiff, and here, too, I don't find that the evidence would be sufficient for a reasonable juror to determine that the clear and convincing evidence standard had been met. Really, it's primarily the same things as with respect to fraud, but I don't find that, and so it's -- the motion is granted with respect to punitive damages.

[RT. VI at 228:18-25, 229:1-19.] The court denied the motion on the breach of contract claim. [RT. VI at 229-232.] That claim for breach of contract went to the jury, which returned a special verdict against GDC on that claim, concluding that there was no contract between GDC and the Wardley Defendants which imposed a condition that Wright not be involved. [R. 1890.] Judgment was then entered in favor of the Wardley Defendants. [R. 1894-1895.]

The Wardley Defendants then filed a motion seeking $399,536.00 in attorney fees and $82,942.80 in costs. [R. 1927, 1827.] GDC opposed the motion. [R. 2062, 2072.] After receiving the parties' memoranda and affidavits and hearing oral argument on the issue, the trial court awarded Wardley $397,911.00 in attorney fees and $12,912.809 in costs. [R. 2152-2164.]

GDC now appeals.

## SUMMARY OF ARGUMENT

1. An appellate court may only affirm a directed verdict if "after 'examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor.'" Daines v.

Vincent, 2008 UT 51, ¶20, 190 P.3d 1269 (quoting Merino v. Albertsons, Inc., 1999 UT 14, ¶3, 975 P.2d 467). Here, there is ample evidence that would support a verdict in favor of GDC on its fraud claim against each of the Wardley Defendants—particularly when that evidence is viewed in a light most favorable to GDC.

Specifically, there was ample evidence that knowing of Wright's involvement with the buyer, Butterfield, was material information to GDC. Particularly where GDC was seller financing to Butterfield and Butterfield was planning on servicing that note through the development and sale of lots in ZVE. Of course, Butterfield was placing sole responsibility for the development and sale of lots in ZVE on Wright. Knowledge that Wright was involved was certainly material to GDC in determining whether to provide seller financing to Butterfield.

Moreover, each of the Wardley Defendants knew of Wright's involvement. They dealt with him almost exclusively as opposed to dealing with their own principal, Butterfield. Wright himself testified that the Wardley Defendants told him that GDC could not find out about his involvement with Butterfield. And when his involvement became a question, the Wardley Defendants did nothing. They continued to secret the information from GDC so that the transaction would close and they would receive their commissions. The Wardley Defendants' failure to disclose this material information to GDC deprived GDC of the opportunity to investigate the level of Wright's involvement. Because they failed to disclose this material information, they denied GDC the

opportunity to become fully informed. As a result, they committed fraud. At the very least, it was the province of the jury to make that determination.

2. If the Court does not reverse the directed verdict, it should reverse the trial court's attorney fees award. Although a trial court has discretion in determining what constitutes a reasonable award of attorney fees, that discretion is not unlimited. Rather, an award of fees must be based upon an evaluation of the evidence. And the burden is on the party seeking the award. Here, the Wardley Defendants requested nearly $400,000 in attorney fees and the trial court rubber stamped that request—reducing the award by only $1,625. This award included an award of over $50,000 for a failed summary judgment motion, including fees incurred on a prior version of the motion that was subsequently withdrawn. In addition, the case was tried in Washington County and the undisputed evidence before the trial court showed a stark contrast between rates charged by attorneys in Washington County and the rates billed by the Wardley Defendants Salt Lake-based attorneys. Nevertheless, the trial court reasoned that the "locality" for purpose of a fee award includes the entire State of Utah as opposed to the actual locality where the case is tried. This was error.

Furthermore, the trial court awarded the Wardley Defendants fees that were incurred, not because of any act of GDC, but because the Wardley Defendants decided to change attorneys in the middle of the case. It awarded the Wardley Defendants over almost $50,000 for fees spent on a mock trial without any showing that this was necessary as opposed to excessive preparation. Finally, the Wardley Defendants did not

apportion their time between recoverable and non-recoverable claims. Indeed, the only claim for which attorney fees were available was the breach of contract claim. Nevertheless, the trial court accepted a conclusory statement by the Wardley Defendants that there was too much overlap between the compensable and non-compensable claims for them to apportion their fees. However, this does not meet the legal standard for apportioning those claims by setting forth, with respect to each, how they are so closely related that they involve the same facts. In short, the trial court's attorney fees' award does not meet the standard of reasonableness established by Utah law.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN TAKING GDC'S FRAUD CLAIM FROM THE JURY.

"'Under Utah law, a party who moves for a directed verdict has the very difficult burden of showing that no evidence exists that raises a question of material fact.'" Mahmood v. Ross, 1999 UT 104, ¶18, 990 P.2d 933 (quoting Alta Health Strategies, Inc. v. CCI Mechanical Serv., 930 P.2d 280, 284 (Utah Ct. App. 1996) (citation omitted)). In considering a directed verdict motion, the trial court must consider the evidence in the light most favorable to the non-moving party. See Mahmood, 1999 UT 104 at ¶18. Additionally, "'the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts.'" Id. (quoting Management Comm. v. Graystone Pines, Inc., 652 P.2d 896, 879 (Utah 1982)). If reasonable jurors could differ on the facts to be determined from the evidence presented, a directed verdict is improper. See id.

An appellate court may only affirm a directed verdict if "after 'examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor.'" Daines v. Vincent, 2008 UT 51, ¶20, 190 P.3d 1269 (quoting Merino v. Albertsons, Inc., 1999 UT 14, ¶3, 975 P.2d 467). Applying this standard shows that the trial court incorrectly took the case from of the jury where it directed a verdict on GDC's fraud claim.

Fraudulent non-disclosure requires the showing of three elements: "(1) a legal duty to communicate, (2) undisclosed material information, and (3) a showing that the information was known to the party who failed to disclose." Moore v. Smith, 2007 UT App 101, ¶33, 158 P.3d 562 (citing Yazd v. Woodside Homes Corp., 2006 UT 47, ¶10, 158 P.3d 562), cert. denied 182 P.3d 910 (Utah 2007). Fraud must be established by clear and convincing evidence. See Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046-47 (Utah Ct. App. 1994). Even so, intent to defraud may be inferred through circumstantial evidence. See id. at 1047.

### A. The Wardley Defendants Had A Legal Duty To Disclose.

The first question in any fraudulent concealment case is whether there exists a legal duty to communicate. See Yazd, 2006 UT 47 at ¶14; Moore, 2007 UT App 101 at ¶33 ("The supreme court specifically emphasized that duty should be analyzed before any other elements"). This is "purely a legal question" reserved for the court. Yazd, 2006 UT 47 at ¶14. "Whether a duty exists is strictly a question of law; it grows out of the

relationship between the parties, and the duties created by that relationship." Moore, 2007 UT App 101 at ¶34.

**(1) LoCicero had a duty to communicate to her principal, GDC.**

As GDC's agent, LoCicero had a well-established "fiduciary duty of full disclosure of facts material to its principal's business." Hopkins v. Wardley Corp., 611 P.2d 1204, 1206 (Utah 1980). This duty included a "duty to inform [her] principal of all facts which might influence [her] principal in accepting or rejecting the offer." Reese v. Harper, 329 P.2d 410, 413 (Utah 1958) (quoting Duncan v. Barbour, 49 S.E. 2d 260, 265 (Va. 1948)). See also Restatement (Third) of Agency § 8.11 (West 2009) ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should known when subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal").

This duty was also imposed by Listing Agreement between GDC and LoCicero. See Listing Agreement § 5.4, Trial Ex. 8 (stating: "A Seller's Agent has fiduciary duties to the Seller which include loyalty, full disclosure, confidentiality, diligence, obedience, reasonable care, and holding sale monies entrusted to the agent."); Agency Disclosure Agreement, Trial Ex. 38 (stating that seller's agent will "act consistent with their fiduciary duties to the Seller of loyalty, full disclosure, confidentiality, and reasonable care"). What is more, the Utah Administrative Code codifies this duty, imposing upon real estate agents a fiduciary duty of "[f]ull disclosure, which obligates the agent to tell

the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction." Utah Admin. Code R162-6.2.15.1(c).

Simply put, as GDC's agent, LoCicero had a legal duty to communicate to GDC all facts that might have influenced GDC's decision to accept or reject Butterfield's offer, including GDC's decision to provide seller financing to Butterfield.

**(2) Grymes, as GDC's broker, had a duty to communicate to GDC.**

As the broker for both seller and buyer in this transaction, Grymes acted in the capacity of a limited agent. See Wardley Corp. v. Welsh, 962 P.2d 86, 89 n.4 (Utah Ct. App. 1998) (noting that "a 'limited agent,' or 'dual agent,' is a broker 'who act[s] as agent for both seller and buyer'"). Though his status as a limited agent meant that each of his principals, GDC and Butterfield, would "'forego certain fiduciary duties,'" see id. (quoting Utah Admin. Code R162-6.2.16.3 (1997) (emphasis added)), it did not absolve Grymes of all fiduciary duties and responsibilities to his principals. Specifically, his status as limited agent did not absolve Grymes of his legal duty not to withhold information material to GDC.

Utah law imposes upon a limited agent the obligation to disclose information if a failure to disclose that information "would be a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill their obligations." Utah Admin. Code R162-6.2.15.3.1(c).[2] The Listing Agreement reiterated this requirement. See

[2] As a matter of public policy, Utah courts even impose upon real estate brokers the duty to disclose accurate and complete information to buyers that the brokers do not represent to ensure that the buyers can make an informed decision. See Hermansen v.

Listing Agreement § 5.6, Trial Ex. 8 ("A Limited Agent must, however, disclose to both parties material information known to the Limited Agent regarding a defect in the Property and/or the ability of each party to fulfill agreed upon obligations, and must disclose information give to the Limited Agent in confidence by either party, if the failure to disclose would be material misrepresentation regarding the Property"). Grymes himself recognized this duty. [RT. III at 214-215 (testifying that he had an obligation not to misrepresent facts and not to conceal pertinent facts).] [3]

Gilbert knew that, if Wright was involved in the transaction at any level, "the odds of [GDC] ending up in bankruptcy or foreclosure was almost absolute." [RT. II at 161:23-25, 162:1-3.] Therefore, Gilbert asked a direct question to Grymes regarding that involvement. Grymes had material information regarding the role that Wright had taken in negotiating and consummating the transaction. This information involved facts "material to [Grymes's] principal's business." Hopkins, 611 P.2d at 1206. This

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Tasulis, 2002 UT 52, ¶20, 48 P.3d 235. If the law requires a broker to disclose facts that are known to him which materially affect the decision making of buyer that the broker does not even represent, it surely imposes a greater duty on a broker who actually represents a principal. See Yazd, 2006 UT 47 at ¶17 ("legal duty . . . is the product of policy judgment applied to relationships"). To hold otherwise would allow brokers to evade the longstanding duties owed to their principals by simply applying the limited agent label.

[3] In fact, the only information that Grymes could not disclose, as a limited agent, was information "given to the [him] by either principal which would likely weaken that party's bargaining position if it were known, unless the agent has permission from the principal to disclose the information." Utah Admin. Code R162-6.2.15.3.1(b). For example, a limited agent may not disclose "the highest price the buyer will pay or the lowest price the seller will accept." Listing Agreement § 5.6, Trial Ex. 8.

information constituted facts "which might influence [Grymes'] principal in accepting or rejecting the offer." Reese, 329 P.2d at 413. In short, it was information that, had Grymes disclosed it, would have led to Gilbert becoming fully informed regarding the level of Wright's involvement. It was information that Grymes, therefore, had a legal duty to communicate to GDC. See id. See also 12 Am. Jur. 2d Brokers § 132 (broker is "under a legal obligation to make a full, fair, and prompt disclosure to the principal of all facts within the broker's knowledge which are or may be material to the matter in connection with which the broker is employed, which might affect the principal's rights and interests or the principal's action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken").

Grymes' duty was particularly applicable given that GDC asked him a specific question. The label of limited agent does not allow the broker to withhold information when asked a direct question by his principal. Cf. Merson v. Schweitzer, 177 A.2d 562, 564 (N.J. Sup. Ct. 1962) ("[w]hen a seller asked the broker a direct question he is entitled to a complete and truthful answer. The broker does not have the right to speculate whether the answer is material to the seller."). Cf. also 12 Am. Jur. 2d Brokers § 132 ("A broker may have a duty to disclose the name of a prospective purchaser to his or her principal in response to a request by the principal for such information"). Given Gilbert's direct question, Grymes had a duty to disclose all information that may be applicable to that question, including the active role that Wright had taken in the negotiation of the

ZVE sale. Grymes could not withhold that information even if he subjectively believed that Wright's role did not rise to the level of "involved."

In sum, Grymes had a legal duty to communicate to his principal, GDC, as the seller who was also financing the buyer's purchase, all information that would lead that principal to make an informed decision. To reduce his risk, Gilbert had clearly stated that Wright could not be involved. Grymes, therefore, had the legal duty to convey all information that would have allowed Gilbert to inform himself as to the level of Wright's involvement and then decide whether he still wanted to finance the transaction. Grymes' failure to disclose that information deprived Gilbert of the opportunity to become fully informed.

**(3) Melling and Riddle had a legal duty to communicate to GDC.**

In directing the verdict as to Melling and Riddle, the trial court reasoned that "their duty to disclose to the plaintiff is not sufficiently clear that a reasonable juror could conclude that failure to disclose constituted clear and convincing evidence of an intent to defraud." [RT. VI at 229:4-8.] It is irrelevant, however, whether a reasonable juror could conclude there was a legal duty to disclose because, as stated above, the existence of a legal duty is "purely a legal question" reserved for the court. Yazd, 2006 UT 47 at ¶14. That duty exists here as a matter of law.

A buyer's agent may not have specific fiduciary duties to a seller, but he is "'expected to be honest, ethical, and competent and is answerable at law for his or her statutory duty to the public.'" Hermansen, 2002 UT 52 at ¶ 22 (quoting Dugan v. Jones,

615 P.2d 1239, 1248 (Utah 1980)). A real estate agent owes a duty, "independent of any implied or express contracts, to be 'honest, ethical, and competent' in her relationship[s]," even if not hired by the other party to the transaction. Id. It is a violation of this duty for a real estate professional to "undertake to secret" material facts that are known to the agent. Id. at ¶23.

Although the case law on the duty to disclose usually relates to material defects in real property, see Dugan, 615 P.2d 1239 (concerning amount of acreage); Hermansen, 2002 UT 52 (concerning soil and subsurface conditions); Secor v. Knight, 716 P.2d 790 (Utah 1986) (concerning nature of deed restrictions against property), application of this principal is not so limited. Rather, the duty springs from the public policy that real estate professionals must act ethically to ensure that the other party to the transaction "'is provided sufficient accurate information to make an informed decision[.]'" Hermansen, 2002 UT 52 at ¶20 (quoting Secor, 716 P.2d at 795). See also Yazd, 2006 UT 47 at ¶¶14-15 (legal duty to communicate is a result of policy judgments).

Here, GDC not only sold the property, it provided seller financing to Melling and Riddle's principal—Butterfield. GDC's status as a lender entitled it to disclosure of material information affecting its decision to finance in the same manner as a buyer is entitled to disclosure of material defects concerning the property itself. Indeed the rationale is the same on both fronts—to provide accurate information to enable one to make an informed decision. Here, GDC would not have provided seller financing had it known Wright initially called Wardley, and that Riddle and Melling dealt almost

exclusively with Wright reviewing agreements, discussing terms, and seeking his instruction. [RT. IV at 5-12, 28-33; IV at 69-71.] Disclosure of that information would have at least led to Gilbert's further investigation into the level of Wright's involvement and GDC's being fully informed. Based on additional investigation, GDC most certainly would not have seller financed the transaction.

Riddle and Melling had a legal duty to communicate to GDC—and not withhold—material information about the transaction that would affect GDC's decision on whether to provide seller financing. Because the trial court directed a verdict for Melling and Riddle on this element, that alone is a sufficient basis to reverse the directed verdict as to Melling and Riddle and remand for a new trial on the fraud claim.

### B. The Undisclosed Information Was Material And The Wardley Defendants Knew It Was Material.

The second element of fraudulent nondisclosure requires that the undisclosed information be material. See Moore, 2007 UT App at ¶33. "To be material, the information must be 'important.' Importance, in turn, is gauged by the degree to which the information could be expected to influence the judgment of a person buying property or assenting to a particular purchase price." Yazd, 2006 UT 47 at ¶34. Here, given the evidence, a reasonable juror could have only concluded that the information the Wardley Defendants withheld was material information. GDC not only sold ZVE, it financed the sale. The question of "importance" or "materiality" can be answered by asking whether GDC would have financed the sale had it known that information. Given the evidence at

trial, reasonable minds could not have differed that the answer to that question was "no."

For example, Steve Gilbert testified that:

- If Wright had set foot on the ZVE property he would be concerned and would have investigated why Wright was there. [RT. II at 159-160.]

- He told Fuller and LoCicero that he would consider seller financing but wanted to know who the individual was and made it clear that if Wright or any mobile manufacturers were involved, he would not consider any seller financing. [RT. II at 135-137.]

- He made it clear to Fuller and LoCicero that, if GDC was to seller finance, it had a right to reject anyone and it unequivocally better not be Wright. [RT. II at 135-137.]

- At the arbitration, he told Grymes that if a manufactured housing concern or Wright was involved, he had no interest in putting the deal back together. Grymes stated that he has no knowledge of anybody, other than Butterfield. [RT. II at 150-154.]

- Gilbert further stated, at least "a couple of times" in the presence of Melling, Riddle, LoCicero, and Fuller that if Wright or a manufactured housing concern were involved, GDC was not financing the deal. No one responded. [RT. II at 150-154, 159.]

- Before closing on the seller financing contract, he called Fuller and LoCicero and told them that he had heard a rumor that Wright was involved and reiterated to both that if Wright was involved, the deal was off. [RT. II at 150-154.]

Karen Fuller's testimony echoed Gilbert's:

- She testified that when they listed the property, she and LoCicero met with Gilbert and he indicated that he did not trust Wright, and that he "didn't want to have anything to do with Dave Wright." [RT. IV at 142-143.]

- She testified that, while GDC would have accepted a cash offer from Wright, he would not provide seller financing if Wright were involved. [RT. IV at 146.]

- She understood that Wright's involvement was something that Gilbert would be interested in knowing, and that knowing who was on the other side of the

deal was very important to Gilbert. [RT. IV at 160, 206-207.]

Butterfield's testimony further underscored the importance of any information that suggested that Wright was involved at any level. Butterfield testified that he planned to service the obligation to GDC solely through the development and sale of lots in ZVE. [RT. V at 46.] He further testified the sole responsibility for development of ZVE fell on Wright. [RT. V at 44.] As a result, the note to GDC was only as good as Wright's ability to develop ZVE—a fact Butterfield understood would be important to GDC. Indeed Butterfield testified that he instructed Melling and Riddle not to disclose Wright's involvement to GDC. [RT. V at 37-39.]

Melling and Riddle also knew that Wright's actions and activity during the negotiation of the sale was material information. For example, Riddle testified that Wright told him not to even mention Wright's name to Gilbert. [RT. IV at 15-17.] Melling testified that, in a telephone conversation with Gilbert after the first transaction failed to close, Gilbert stated that he wanted to make sure that Wright was not involved. [RT. IV at 76-77.] What is more, Wright testified that in November or December Riddle and Melling called him to tell him that if Gilbert "got wind" of Wright's involvement, the deal would not close and they would lose their commission. [RT. IV at 230-233.] Butterfield's testimony was similar, indicating that Melling and Riddle told Butterfield that no one could know that Wright was involved or the property would not be sold. [RT. V at 26-30.]

In short, there was more than sufficient evidence to show that information concerning Wright's involvement with Butterfield was material to GDC in determining whether to provide seller financing. Indeed, there was no dispute that, had GDC known any of the information that the Wardley Defendants withheld, it would not have provided that financing because Gilbert feared the project would fail and Butterfield would default. Had GDC known the information, it would have at least been able to become fully informed regarding the level of Wright's involvement. The Wardley agents and their broker knew of the materiality of this information and withheld it.

### C. The Evidence Reflects That The Wardley Agents And Their Broker Knew And Failed To Disclose Material Information.

The final element of the fraud claim requires a showing that the information was known to each defendant who failed to disclose it. See Moore, 2007 UT App at ¶33. Here, a reasonable juror could surely have concluded that each defendant, at the very least, knew information concerning Wright's and which indicated he was involved in the transaction. There is no dispute that the Wardley Defendants failed to disclose this material information. Indeed, it is worth noting that during argument for the Motion for Directed Verdict, counsel for the Wardley Defendants conceded there was sufficient evidence for this issue to go to the jury: "I'm not saying that we lack evidence from which a jury might conclude that the real estate agents were dishonest, or that they didn't disclose something, or that they knew something. I agree. There's enough evidence to go to the jury on that. My point is, that's a tort. It's not a contract claim." [RT. VI at

219:6-10.] Counsel was correct, the evidence was sufficient for the issue to go to the jury.

**(1) There was sufficient evidence to show that the information was known by LoCicero.**

The trial court directed a verdict for LoCicero on the grounds that it did not "find that a reasonable juror could conclude that the failure to disclose a hunch or intuition or suspicion, which admittedly was without particular evidence, would equal an intent to defraud by . . . Ms. [LoCicero][4] sufficient to meet the clear and convincing evidence standard." [RT. VI at 228:23-25, 229:1-3.] But, there was sufficient evidence in which a reasonable juror could conclude that LoCicero knew material information and failed to disclose it to GDC. For example, as set forth above, Gilbert testified that he had made it clear to both Fuller and LoCicero that Wright could not be involved in a seller finance transaction. [RT. III at 52-56, IV at 142-146, 176-177.] Moreover, Gilbert testified that, upon hearing a rumor that Wright was involved, he called LoCicero and asked her about it. [RT. II at 199-200.]

LoCicero denied ever hearing the name Dave Wright until after the transaction closed. [RT. VI at 67, 70.] That made her the only person involved in the transaction who claimed to have no knowledge whatsoever of Wright's actions. [RT. VI at 67, 70-77, 87.] The jury was entitled to weigh this evidence to determine whether it was plausible, and whether she was credible. Again, a jury is entitled to infer fraud from

[4] The trial court actually used Fuller's name in its ruling. However, Fuller was not a defendant so GDC assumes that the trial court must have been referring to LoCicero.

circumstantial evidence. See Andalex Resources, Inc., 871 P.2d at 1046-47. When viewed in a light most favorable to GDC, the evidence was sufficient for a reasonable juror to conclude that LoCicero knew that GDC would not seller finance if Wright was involved at any level and, before the transaction closed, was put on notice to investigate that purported involvement. As GDC's agent, she had a duty to investigate rather than do nothing. See Restatement (Third) of Agency § 8.11 (West 2009). A reasonable juror could therefore conclude that LoCicero had material information connecting Wright to the transaction, and failed to disclose it so that she could receive the largest residential commission of her career.

**(2) Grymes had material information and failed to disclose it.**

The trial court directed a verdict in favor of Grymes because it did not "find that a reasonable juror could conclude that the failure to disclose a hunch or intuition or suspicion, which admittedly was without particular evidence, would equal an intent to defraud by Mr. Grymes . . . sufficient to meet the clear and convincing evidence standard." [RT. VI at 228:23-25, 229:1-3.] However, there was ample evidence from which a reasonable juror could conclude that Grymes had much more than a "hunch, intuition, or suspicion" regarding Wright's involvement:

- Grymes testified that he knew that Wright was involved in the manufactured housing business, had met Wright, and was aware of Capital Housing company prior to this transaction ever occurring. [RT. III at 220-221, 222.] He never once met Butterfield. [RT. III at 222.]
- Wright testified that he spoke with Grymes on several occasions, explaining that Wardley's $100,000 commission is "going to slip away because [Gilbert] was

antsy and he wanted—he wanted to either get it done or get off the pot, basically. I mean get something going here." [RT. IV at 228-235]

- Melling testified that he told Grymes about Wright's involvement, and that documents for the transaction would need to go through Wright to get to Butterfield. [RT. IV at 74-75.]

- Indeed, Melling testified that he has no doubt that he told Grymes about Wright's involvement. [RT. IV at 101.]

- Grymes received a demand letter from Mobile Mansions stating that it (rather than Butterfield) was entitled to the $100,000 deposit. In Grymes' letter to GDC scheduling arbitration, he did not mention Mobile Mansions. [Trial Ex. 26 & 28.]

- The $100,000 earnest money checks were provided by Mobile Mansions and were made out to Wardley. [RT. IV at 233.]

- Despite his knowledge of Wright's role in the transaction, Mobile Mansions' delivery of the $100,000 earnest money, and Mobile Mansions demand on that earnest money, when Gilbert asked Grymes who was involved on the other side of the transaction, Grymes did not mention Wright or Mobile Mansions. [RT. II at 150-162.]

- Fuller testified that she went to Grymes asking about Wright's involvement in the transaction but was told by Grymes not to pursue it because she could not prove it. [RT. IV at 157.]

Viewing this evidence in a light most favorable to GDC, a reasonable juror could conclude that Grymes had significant information that Wright was involved. Even if Grymes did not subjectively believe that Wright was "involved" (however Grymes defined that term), the information he had regarding Wright's actions with respect to the transaction was still material and he withheld it. Moreover, given Grymes' response to Fuller when she approached Grymes regarding Wright's alleged involvement, a reasonable juror could conclude that Grymes withheld the information because he did not

want to lose a large commission. Simply put, given this evidence, it was reversible error for the trial court to direct a verdict for Grymes.

**(3) Melling had material information and failed to disclose it.**

Again, the trial court's directed verdict for Melling and Riddle rested on its conclusion that there was no clear and convincing evidence of a duty to disclose. As discussed above, duty is a legal determination for the court rather than the jury and Melling and Riddle had that legal duty. On this point alone, this Court should reverse the trial court's directed verdict.

To the extent the Court considers the third element of the claim, however, the trial testimony provided ample evidence with which a reasonable juror could conclude that Melling had material information regarding Wright that he failed to communicate to GDC. For example, Melling knew that he spoke exclusively with Wright and never spoke with Butterfield in negotiating the terms of the sale. [RT. IV at 69-71.] Indeed, Melling corresponded with Wright, seeking instruction from him in reviewing contracts. [Trial Ex. 23.] And, when Melling did correspond with Butterfield, he communicated Gilbert's concern about Wright's involvement, all in an effort to salvage the deal before it fell apart and he lost his commission [RT. IV at 94-95-96]:

> The seller unfortunately has now declined to sign the addendum – said he does wish to carry – I have not been able to change his mind – said his concern was the possibility that Capital Housing would put all the new homes in there and that he did also not want to be a bank. His new verbal terms were: 1) Will extend closing to the 15th of Nov. but must release to earnest money immediately. 2) – must obtain financing by 15th & close on the fifteenth. 30 or closing could be the 30th with 2 weeks of interest starting from the fifteenth. [Trial Ex. 17.]

> The seller has not signed your new addendum. He called me this morning & said that he did 1) "Not wish to be a bank", 2) said that he had heard that Capital Housing was showing lots in the development & is concerned that they are going to be doing all of the homes, 3) concerned that he may have to repossess the development, 4) concerned because he does not know your financial situation. Then his terms were now as follows:
> 1) extend closing to 15th day of Nov – cash out full contract price.
> 2) release earnest money immediately! 3) can close on 30th but interest would be charged for 2 weeks – please call me very soon. Thx Lloyd Melling. [Trial Ex. 22]

In addition, the following testimony shows Melling's knowledge and failure to disclose:

- Melling never disclosed to Gilbert that Capital Housing was involved, even though Melling knew as much. [RT. IV at 97.]

- Melling knew that Wright was involved because he knew Wright was trying to find a location on which to place his mobile homes. [RT. IV at 71-72.]

- Melling told Grymes about Wright's involvement and that all documents would need to go through Wright to get to Butterfield. [RT. IV at 74-75.]

- Melling acknowledged that he knew Gilbert was concerned that, if GDC seller-financed, GDC would have to repossess if Capital Housing was involved. [RT. IV at 99.]

- Melling spoke with Gilbert after the cash deal failed to close (after November 1, 1999), and took away from his conversation that Gilbert did not like Wright. [RT. IV at 107.]

Wright also testified that he had discussions with Melling and that Melling told him that "if Steve Gilbert had word that Dave Wright was involved in this deal, the deal wouldn't happen, period." [RT. IV at 233-34.] This testimony alone provides sufficient evidence to convince a reasonable juror that Melling had information concerning Wright that he knew would be material to GDC and withheld it. Nevertheless, other witnesses echoed this testimony.

For example, Butterfield testified that Melling informed him that "the seller of the property—the project did not want to do business with him—Dave Wright." [RT. V at 29-31.] Butterfield further testified that he had telephone conversations on this issue:

> Q. Do you recall whether or not the issue of keeping Mobile Mansions and Dave Wright uninvolved and undisclosed in the transaction ever came up again in subsequent conversations with Mr. Melling?
> A. Well, apparently from the time we started the transaction until the end of the transaction, there was hints that the seller of the property knew or heard a rumor or something that Dave Wright was involved. That caused a lot of conflict, and that's why we had the conversations over the phone. So we -- my conversation had been him -- to make sure that everything was kept this way, that I was the purchaser.
> Q. Kept what way?
> A. That I was the purchaser of the home.
> Q. Rather than Mobile Mansions?
> A. Yes.
> Q. And rather than Dave Wright?
> A. Yes.
> Q. Who did you have that conversation with at Wardley, if anyone?
> A. It would have been with the real estate sales people that I was doing business with.
> Q. Melling?
> A. Melling, and perhaps the other gentleman. It was two gentleman.
> Q. Mr. Riddle?
> A. Yes.

[RT. V at 34-35.] Butterfield later repeated that he had conversations with Melling in which they discussed keeping Wright "completely out of it" so Gilbert would not find out about his involvement. [RT. V at 38-39.]

In sum, the testimony of Melling himself, coupled with that of Wright and Butterfield constitutes ample evidence—particularly when viewed in a light most favorable to GDC—from which a reasonable juror could conclude that Melling had

information regarding Wright and withheld it so Gilbert would not be able to investigate the level of Wright's involvement and become fully informed. Therefore, the trial court erred in taking the issue from the jury.

**(4) The evidence showed that Riddle had material information and failed to disclose it.**

There is also ample evidence with which a reasonable juror could conclude that Riddle knew material facts regarding Wright and failed to communicate those facts to GDC. For example, Riddle's own testimony shows that:

- He first heard of ZVE when Wright called and asked him about it. [RT. IV at 5.]
- Prior to the closing ever occurring, he knew that Wright, not Butterfield, was "in charge" of the project. [RT. IV at 9:4-5.]
- Riddle dealt exclusively with Wright and knew that Wright's company, Mobile Mansions, was going to put homes at Zion View Estates and sell them. [RT. IV at 7-9, 11.]
- He faxed documents to Wright and reviewed purchase agreements with Wright at the Capital Housing office. [RT. IV at 9-10, 12.]
- He knew in 1999 that Gilbert had indicated he did not want to deal with Wright. [RT. IV at 14-16.]
- Wright told Riddle not to mention Wright's name to Gilbert. [RT. IV at 15-17.]
- Consistent with this instruction, both Fuller and Riddle himself testified that when Fuller asked him about Wright and told him that Wright could not be involved in the transaction, Riddle responded: "Dave Wright's not involved in this contract." [RT. IV at 19:20-21; 39:13-21.]
- Fuller further testified that, prior to closing, she asked Riddle if Wright was involved and, rather than denying Wright's involvement, Riddle told her that she could not prove it. [RT. IV at 150, 154-155.]
- Wright testified that he was going to contact Gilbert directly but was told by the agents at Wardley (Riddle and Melling) not to do so. [RT. IV at 239.]

- Wright further testified that Riddle was his primary contact and the person with whom he initially dealt with in negotiating the transaction. [RT. IV at 225-227.]

Viewing the evidence in a light most favorable to GDC, the evidence is clear: Riddle had information regarding Wright that, had he disclosed it to GDC, GDC would not have financed the transaction or at least would have had the opportunity to become fully informed regarding Wright's involvement. This evidence is more than sufficient to allow a reasonable juror to find in favor of GDC on the fraud claim.

In sum, the evidence at trial was more than sufficient to show that the Wardley Defendants had a duty to disclose all information regarding Wright, that the information regarding Wright's role in the negotiation and consummation of the ZVE sale was material, and that the Wardley Defendants possessed this information and failed to disclose it. Simply put, had the information regarding Wright been disclosed, GDC would not have seller-financed the transaction or Gilbert could have at least taken the steps necessary to become fully informed regarding the level of Wright's involvement. The Wardley Defendants withheld all information regarding Wright and deprived GDC of the opportunity to become fully informed. Therefore, the trial court erred in directing a verdict on the fraud claim and this Court should reverse and remand for a trial on that claim.

## II. A REVERSAL OF THE DIRECTED VERDICT SHOULD RESULT IN A REVERSAL OF THE ATTORNEY FEE AWARD.

The attorney fee award arises from Defendants' status as the "prevailing party" and as authorized by the Listing Agreement, which provides for attorneys fees to the

prevailing party in litigation arising out of the agreement. [R. 1933.] Nevertheless, a reversal of the directed verdict on the fraud claim should result in a reversal of the attorney fee award.

In determining the "prevailing party," a court must consider, *inter alia*, the number of claims and the importance of such claims "in the context of the lawsuit considered as a whole." R.T. Nielson Co. v. Cook, 2002 UT 11, ¶25, 40 P.3d 1119 (setting forth the list of non-exclusive factors a trial court should consider in determining which party is the prevailing party). A court cannot make this determination until all claims are resolved. Cf. id. at ¶¶23-26 (discussing difficulty of determining prevailing party in multi-claim cases); Meadowbrook, LLC v. Flower, 959 P.2d 115, 117 (Utah 1998) (holding that a party does not become entitled to attorney fees until there has been a determination of which party has prevailed in the case which does not occur until the "trial phase" of the case ends).

Quite simply, a party who prevails on some, but not all claims in a multi-claim case is not *de facto* the "prevailing party" for purposes of awarding attorney fees. See, e.g., Carlson Distrib. Co. v. Salt Lake Brewing Co., 2004 UT App 227, ¶¶39-40, 95 P.3d 1171 (affirming trial court determination that party who prevailed on one of numerous claims was not the prevailing party for purposes of awarding attorney fees even though claim netted party a $273,000 judgment). This case is a multi-claim case. [R. 1-63.] A new trial on the fraud claim could result in a judgment in GDC's favor. In that event, the Wardley Defendants could hardly be said to have "prevailed." Rather, the trial court

would have to consider and resolve the issue in the context of the suit as a whole. As such, a reversal of the directed verdict should also result in a reversal of the attorney fee award.

## III. THE TRIAL COURT'S AWARD OF ATTORNEY FEES WAS NOT REASONABLE.

### A. The Legal Standard For Determining Reasonableness.

The standard for awarding attorney fees in Utah is reasonableness. This is so even where, as here, the contract provision providing for an award of fees to the prevailing party does not mention that the fees must be "reasonable." See Kraatz v. Heritage Imports, 2003 UT App 201, ¶¶27-28, 71 P.3d 188. Determining reasonableness of attorney fees is not subject to a set formula. See Dixie State Bank v. Bracken, 764 P.2d 985, 989 (Utah 1988). Rather, the trial court should consider numerous factors, including what work was actually performed; how much of the work was reasonably necessary to adequately prosecute the matter; whether the billing rate is consistent with the rate charged in the locality for similar services; and other circumstances requiring consideration of additional factors in the rules of professionalism. See id.

In considering these factors, the court is not compelled to accept an attorney's self-serving testimony regarding his attorney fees. See, e.g., Amyx v. Columbia House Holdings, Inc., 2005 UT App 118, ¶3, 110 P.3d 176 ("[t]he court's determination of reasonableness is not bound by the prevailing party's affidavit"); Dixie State Bank, 764 P.2d 985 at 989 (court not required to accept an attorney's self-interested testimony regarding reasonableness of fees). Nor is the court to measure reasonableness by what an

attorney actually bills or the time the attorney actually spends on a matter. See Cabrera v. Cottrell, 694 P.2d 622, 624-25 (Utah 1985). And, although a trial court has discretion to determine an award of attorney fees, the exercise of that discretion must be based on an evaluation of the evidence. See Dixie State Bank, 764 P.2d at 991. When the evidence presented is insufficient, the court's evaluation of those fees will also be insufficient. See id.

Finally, the burden of proving the reasonableness of requested attorney fees rests on the party seeking its fees. See Cottonwood Mall Co. v. Sine, 830 P.2d 266, 268 (Utah 1992) ("A party who requests an award of attorney fees has the burden of presenting evidence sufficient to support an award"). Moreover, the burden of proving reasonableness at all times remains with the fee applicant and never shifts. See id.; Salmon v. Davis County, 916 P.2d 890, 893 (Utah 1996) (Durham, J., lead opinion) (stating that "[a] party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award"); Holladay Towne Ctr., LLC v. Brown Family Holdings, LLC, 2008 UT App 420, ¶21, 198 P.3d 990 (reversing award of fees as to amount where fee applicant's affidavit was insufficient); R.T. Nielson Co. v. Cook, 2002 UT 11, ¶20, 40 P.3d 1119 (focusing solely on sufficiency of fee affidavit in determining whether fees were reasonable); Mountain States Steel, Inc. v. Voest-Alpine Servs. & Technologies Corp., 2002 UT 62, ¶39, 52 P.3d 1179 (party claiming fees "must carry the burden" in establishing those fees). See also Utah R. Civ. P. 73(a) (providing "[w]hen

attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony").

Against this backdrop, GDC challenged the reasonableness of numerous categories for which fees were requested, and ultimately awarded. Nevertheless, the trial court essentially rubber stamped the Wardley Defendants' fee request—deducting only $1,625 from a nearly $400,000.00 fee request. Measured against a proper standard of reasonableness, the trial court's award cannot stand.

### B. Wardley Cannot Recover $54,407.50 In Attorney Fees Expended On Its Unsuccessful Motion For Summary Judgment.

Utah law clearly holds that prevailing party may not recover attorney fees for time spent on an unsuccessful motion. See ProMax Dev. Corp. v. Raile, 2000 UT 4, ¶32, 998 P.2d 254 (prevailing party "not entitled to fees in pursuing their unsuccessful motion to dismiss"); Cache County v. Beus, 2005 UT App 503, ¶17, 128 P.3d 63 (reversing trial court for awarding prevailing party attorney fees for unsuccessful motion for summary judgment). Here, the Wardley Defendants attorney requested and was awarded $54,407.50 for an unsuccessful motion for summary judgment. [R. 2155-2156.] The trial court simply ignored governing case law, reasoning that over $50,000.00 for a failed summary judgment motion was reasonable in a case of this magnitude. [R. 2156.]

The trial court justified its ruling on the grounds that sometimes a motion for summary judgment can be of strategic benefit because it can "test the resolve of the opposing party" or test the opposing party's command of the facts or understanding of the legal theories. [R. 2156.] The trial court took appellate courts to task, noting that they

"are apparently unacquainted with the proper uses of summary judgment motions . . ." [R. 2156 n.4.] Regardless of the trial court's views of summary judgment practice and its impression of governing case law, it must follow that law. What is more, there is no evidence that the Wardly Defendants' failed motion did anything to test GDC's "resolve" or mastery of the facts. GDC survived the motion and, therefore, prevailed. [R. 1625.] Indeed, it drew praise from the trial court for its argument and materials that were "expertly and professionally presented." [Id.] For this reason alone, the Court should reverse the attorney's fees award on this issue.

Not only was this ruling erroneous as a matter of law, a thorough examination of the billing records submitted to support the award reveals that the time spent on the failed motion was unreasonable. [R.1990-2059; 1949-1989.] The Wardley Defendants' counsel generated a collective $54,407.50 in attorney fees drafting, revising, editing, discussing, analyzing, researching, then further drafting, revising, editing, discussing, analyzing, and researching the failed motion. [Id.] This work included numerous entries between several attorneys on matters such as "[r]eview and analyze summary judgment motion" [R. 2009]; "revise summary judgment" [R. 2010]; "revise summary judgment hearing outline" [R. 2012]; "strategize re motion for summary judgment" [R. 2022]; and "analysis of summary judgment ruling" [R. 2035].

In total, five different attorneys in two different law firms, Snell & Wilmer ($50,038.50) and Jones Waldo ($4,369.00),[5] generated fees for the failed motion. And, the fees billed by Jones Waldo relate to a motion for partial summary judgment that was filed but later withdrawn before argument. [R. 952, 1092-93.] No reasonable basis exists for awarding fees incurred on a motion that was withdrawn and never heard or decided. The trial court's failure to reduce fees spent on that motion is, therefore, an abuse of discretion. See Crookston Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993) (a trial court abuses its discretion when there is "no reasonable basis for [its] decision").

In sum, there was no reasonable basis for awarding the Wardley Defendants $54,407.50 in attorney fees for unsuccessful and withdrawn summary judgment motions.

### C. The Rates Charged By The Wardley Defendants' Attorneys Are Not Consistent With The Rates Charged In The "Locality" And Should Be Reduced Accordingly.

Where determining a reasonable fee, a trial court should consider whether "the attorney's billing rate [is] consistent with the rates customarily charged in the locality for similar services." Dixie State Bank, 764 P.2d at 990; see also Utah R. Prof'l. Conduct 1.5(a)(3). The trial court took issue with this standard, stating that it was "vague," and that "locality" must be taken to mean "the general geographic area in which a party litigating in this Court might reasonably look for litigation counsel." [R. 2159-2160.] According to the trial court, "locality" means "the State of Utah." [R. 2160.] The trial court erred.

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[5] Snell & Wilmer replaced Jones Waldo as the Wardley Defendant's counsel during the course of the litigation. [R. 1993.]

While Utah's appellate courts have not yet addressed what the term "locality" means for purposes of this standard, it is unlikely that case law and the professional rules would use that term if it applied to the entire state. If "locality" actually meant the "entire State of Utah" judges and rule drafters would have used the term "in the State" or "in Utah." They declined to use such far reaching geographic terms, opting instead to use the term "locality," which connotes immediate geographic proximity. See Webster's New World College Dictionary 842 (4th ed. 2006) (defining "locality" as "a place, district, neighborhood").

Consistent with this definition, courts consistently narrow the geographic reach of the locality when determining the market rate. See, e.g., Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 955 (1st Cir. 1984) (limiting market to specific county); Coulter v. Tennessee, 805 F.2d 146, 149 (6th Cir. 1986) ("hourly rates for fee awards should not exceed the market rates necessary to encourage competent lawyers to undertake the representation in question"). Thus, "a renowned lawyer who customarily receives $250 an hour in a field in which competent and experienced lawyers in the region normally receive $85 an hour should be compensated at the lower rate." Coulter, 805 F.2d at 149.

Another court provided perhaps the most thorough explanation of the standard for determining the market rate in the locality:

> when a counselor has voluntarily agreed to represent a plaintiff in an out-of-town lawsuit, thereby necessitating litigation by that lawyer primarily in the alien locale of the court in which the case is pending, the court should deem the "relevant community" for fee purposes to constitute the legal community within that court's territorial jurisdiction; thus the "prevailing market rate" is that rate which lawyers of comparable skill and experience can reasonably expect to command within the

> venue of the court of record, rather than foreign counsel's typical charge for work performed within a geographical area wherein he maintains his [or her] office and/or normally practices, at least where the lawyer's reasonable "home" rate exceeds the reasonable "local" charge.

Gratz v. Bollinger, 353 F. Supp. 2d 929, 946 (E.D. Mich. 2005) (quoting Adcock-Ladd v. Sec'y of Treasury, 227 F.3d 343, 350 (6th Cir. 2000)). Thus, the trial court should have asked whether the fees charged by Wardley Defendants' attorneys were consistent with the rates charged for similar services by attorneys in St. George, Utah. See, e.g., Hall v. NACM Intermountain, Inc., 1999 UT 97, ¶28, 988 P.2d 942 (affirming trial court's determination of reasonableness based on "other local attorneys' rates").

Nevertheless, the Wardley Defendants did not even attempt to show that the rates charged by their attorneys in Salt Lake are consistent with the rates charged in St. George, even though such a showing is their burden. See Salmon v. Davis County, 916 P.2d 890, 893 (Utah 1996) (Durham, J., lead opinion) (stating that "[a] party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award"); Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980) (noting absence of testimony regarding rates commonly charged in community). To the contrary, the undisputed evidence before the trial court showed that the rates charged by the Wardley Defendants' attorneys were not consistent with the rates customarily charged in St. George.

When this case began, Russell S. Mitchell at Jones Waldo's St. George office represented the Wardley Defendants and charged them $170.00 per hour. [R. 1951-1993.] When Snell & Wilmer inherited the case, rates increased dramatically—to $300 per hour—a $130 per hour increase for the lead attorney on the case. [R. 1995.]

According to the Lalli affidavit, Snell & Wilmer attorneys charged $250-$350 per hour for work performed by partners, $155-255 per hour for work performed by associates, and $115-160 per hour for paralegals, project assistants, and even costs related to individuals from Snell & Wilmer's "IT Department."[6] [R. 1995.] These fees stand in stark contrast to the rates charged by attorneys at Jones Waldo's St. George office during the same time period. For example, as set forth in the Mitchell Affidavit, D. Williams Ronnow, one of the most experienced members of the Southern Utah trial bar, charged only $220.00 per hour. [R. 1952.] M. Eric Olmstead, another St. George-based Jones Waldo attorney, charged $190.00 per hour. [R. 1952.] Thus, these seasoned lawyers in St. George charged the same as mid-level associates at Snell & Wilmer's Salt Lake City office.

Similarly, the undisputed evidence before the trial court showed that, during the time period in question (2004-2008), the rates for the most experienced litigation attorney in Durham Jones & Pinegar's St. George office was $175-225 per hour. [R. 2087.] Rates for experienced litigation associates and shareholders at Durham Jones ranged from

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[6]The Wardley Defendants requested and were awarded $2,648.85 in fees for "Proj[ect] Assist[ants]." [R. 1995.] These are not attorney fees at all. Rather, they merely reflect standard overhead in any law firm and should not be compensable here. See, e.g., Flying J Inc. v. Comdata Network, Inc., 2007 U.S. Dist. LEXIS 84554, **74-75 (D. Utah 2007) (disallowing request for fees and costs for non-attorney related expenses, reasoning that such expenses "should normally be borne as part of the overhead expense component of counsel's standard billable hourly rate rather than being shifted to an opposing party as an additional expense pursuant to a contractual attorney's fee clause"). Ironically, GDC made the same argument to the trial court with regard to a request for $1,625.00 in fees for Snell & Wilmer's IT Department and the trial court agreed—reducing the fees request by $1,625.00. [R. 2154.]

$135-210 per hour and rates for litigation associates ranged from $120-190 per hour during this time period. [R. 2088.]

It is no surprise that the fees charged by Salt Lake City firms are higher than those in St. George. This is precisely the reason the term "locality" is used in the cases and rules—to award a prevailing party a fair attorney fee commensurate with other attorneys where the case is tried.

In sum, the undisputed evidence showed a stark contrast between billing rates in the locality of St. George and the rates requested by the Wardley Defendants' attorneys from Salt Lake City. With no evidence to dispute the local rates, the trial court erred in failing to reduce the Wardley Defendants' requested fees and should be reversed.

### D. Wardley Defendants Cannot Recover Attorney Fees Expended For The Transition Between Jones Waldo And Snell & Wilmer.

It is per se unreasonable to award attorneys fees incurred as a result of a change of counsel. See Sun Publ'g Co., Inc. v. Mecklenburg News, Inc., 594 F. Supp. 1512, 1518 (E.D. Va. 1984) (holding prevailing party not entitled to recover expenses incurred as a result of a "mid-stream change of counsel"); Paris v. Dallas Airmotive, Inc., 2004 U.S. Dist. LEXIS 18893, *15 (N.D. Tex. 2004) (stating non-prevailing party "should not be required to pay more than one attorney or set of attorneys for going over the same thing, especially if no fault can be attributed to" non-prevailing party for change in counsel); Corbett v. Reliance Moving & Storage, Inc., 2007 U.S. Dist. LEXIS 96747, *17 (E.D.N.Y. 2007) (reducing fees for duplication of work resulting from change in firms during the middle of litigation).

Snell & Wilmer replaced Jones Waldo (St. George office) as the Wardley Defendants' counsel in January 2005. [R. 1993.] An examination of the billing records reveals that the attorneys spent approximately $2,632.50 on issues related to the transition, *e.g.*, discussions between the new and former law firms, matters related to transition and substitution of counsel, and review of documents provided by former counsel. [R. 2020-2022.]

Despite clear case law, the trial court refused any reduction on the grounds that GDC was simply speculating that the requested fees related to transition. Nevertheless, the Wardley Defendants have the burden to show reasonableness, and that burden did not shift to GDC. The Wardley Defendants presented no evidence that the time spent by their current and prior firms was for anything other than transition between the two firms. In short, GDC should not have to shoulder the costs of the Wardley Defendants' decision to switch attorneys.

Indeed, prior to the representation switching to Snell & Wilmer, Jones Waldo generated $61,146.00 in fees. [R. 1952.] A review of the billing records does not reveal whether or not any fees requested by the Wardley Defendants were the result of duplicative work performed by both firms.

Next, a significant amount of time and expense was spent by the Wardley Defendants in the California bankruptcy litigation, In re Mobile Mansions, Inc., Case No. SV 01-15535 AG (Bankr. C.D.Cal.). [R. 1955-1989.] The Wardley Defendants do not argue that time spent on the bankruptcy litigation is compensable. Nevertheless, there is

no effort to make any differentiation between time spent on the bankruptcy litigation as opposed to time spent on this case.

Again, the Wardley Defendants bear the burden of proving reasonableness. See Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269 (Utah 1992). That burden includes accounting for those items that were duplicated from firm to firm or otherwise incurred in the bankruptcy litigation. Because the Wardley Defendants failed to meet that burden, and accurately account for their requested fees, the trial court should have used its best judgment to reduce the fees. See, e.g., Coulter, 805 F.2d at 152 (stating "where duplication of effort is a serious problem" district court "may have to make across the board reductions by reducing certain items by a percentage figure"); Loranger v. Stierheim, 10 F.3d 776, 783 (11th Cir. 1994) (approving percentage reduction, stating "when faced with a massive fee application [] an hour-by-hour review is both impractical and a waste of judicial resources"). This Court should remand to the trial court with instructions to make such a reduction.

### E. The Trial Court Erred In Awarding $45,669.00 Attorney Fees Incurred for the "Mock Trial."

The Wardley Defendants also requested, and the trial court awarded, $45,669.00 in fees for a "mock trial." This award must be reversed. While there is no per se rule of unreasonableness when it comes to jury consulting and trial preparation, the party requesting those fees must demonstrate that they are reasonable, and not the result of excessive preparation. See O'Sullivan v. City of Chicago, 484 F. Supp. 2d 829, 837 (N.D. Ill. 2007) (stating there is a difference "between ample preparation and excessive

preparation"). "While parties are undeniably entitled to solicit and to engage the services of legal experts the world over, [an] attorneys' fee provision does not require that even the excessive costs incurred in securing such consultations be charged to the ultimately nonprevailing party." Charles v. Daley, 846 F.2d 1057, 1076 (7th Cir. 1988).

As noted by one court, a losing party is expected to pay for "hours reasonably spent in the argument and its preparation, but not for excessive hours, or hours spent in learning or excessively rehearsing appellate advocacy." Maldonado v. Houstoun, 256 F.3d 181, 187 (3rd Cir. 2001). Though this rationale occurred in the context of appellate argument, it equally applies here. Indeed in O'Sullivan, the court applied similar reasoning in rejecting a claim to fees and costs for a mock trial because it was not shown that mock trial was necessary and reasonable. O'Sullivan, 484 F. Supp. 2d at 837; see also Clawson v. Mountain Coal Co., 2007 U.S. Dist. LEXIS 87499, *47 (D. Colo. 2007) (reducing fee request for time spent working with a jury consultant where party requesting same failed to adequately demonstrate their utility and reasonableness and did not submit evidence to show that mock trial services were typically used by attorneys).

Here, the only evidence presented concerning the reasonableness of the fees generated through the mock trial was the self serving statements from counsel that all of the fees requested were reasonable. [R. 1996.] Counsel did not demonstrate the utility of the mock trial, the reasonableness of the fees charged for participation in the mock trial, or that attorneys in Washington County typically engage in this type of activity. Nor is there any evidence that St. George attorneys bill for fees spent with mock juries.

GDC made essentially this same argument in arguing for a reduction in the $49,943.00 in costs for the mock trial. [R. 2064-2066.] The trial court agreed with GDC, reasoning that: "[t]here is no evidence before the Court to show that such costs were reasonable, except a blanket assertion in Mr. Lalli's affidavit." [R. 2162.] The same logic should apply to the attorney fees expended on the mock trial. In sum, the trial court abused its discretion in awarding $45,669.00 in attorney fees expended on the "mock trial" and this Court should reverse that award.

### F. The Wardley Defendants Failed To Adequately Explain Their Rationale For Failing To Apportion Time Between Recoverable And Non-Recoverable Claims.

Finally, the Wardley Defendants concede that their claim to attorney fees is based entirely upon the Listing Agreement and that there were substantial claims in the litigation that were not contractually based. [R. 1933-1934.] It is established law that "[o]ne who seeks an award of attorney fees must set out the time and fees expended [] for successful claims for which there may be an entitlement to attorney fees," and "claims for which there is no entitlement to attorney fees." Cottonwood Mall Co., 830 P.2d at 270. The Wardley Defendants failed in this regard. Rather, they simply cited to Brown v. David K. Richards & Co., 1999 UT App 109, 978 P.2d 470, and asserted that there is too much overlap between the compensable and non-compensable claims for them to apportion their fees. [R. 1933-1934.]

This excuse does not meet the standards required by Utah law. To rely on this excuse, the Wardley Defendants must review each claim in this case, and attempt to set

forth, with respect to each, why they are closely related such that they involve the same or related facts. Brown v. David K. Richards & Co., 1999 UT App 109 at ¶20. The Wardley Defendants made no such attempt and, without more, they did not meet their burden in establishing the necessary foundation to make adequate findings of fact and conclusions of law regarding apportionment of fees and whether the apportionment is reasonable. See Dixie State Bank, 764 P.2d at 988 ("an award of attorney fees must be supported by evidence in the record"); Cabrera, 694 P.2d at 624 ("award of attorneys fees must generally be made on the basis of findings of fact supported by evidence and appropriate conclusions of law").

## CONCLUSION

This Court should reverse the trial court's directed verdict and remand the matter so that GDC may have a new trial on its fraudulent concealment claim. That reversal should also require the reversal of the award of attorney's fees. If the Court does not reverse the directed verdict, however, it should still reverse the trial court's award of attorney fees and remand with instructions to determine the reasonableness of those fees through application of correct legal standards.

DATED THIS 26th day of October 2009.

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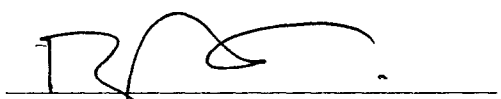
## CERTIFICATE OF SERVICE

In accordance with Utah R. App. P. 26(b), I, Bryan J. Pattison, certify that on October 26, 2009, I served two (2) copies of Appellant's **BRIEF OF APPELLANT** upon counsel for Appellees in this matter, via first class mail with sufficient postage prepaid, to the following address:

Matthew L. Lalli
James D. Gardner
SNELL & WILMER, L.L.P.
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, Utah 84101-1004



BRYAN J. PATTISON

Tab 1


# STATE OF UTAH
# DEPARTMENT OF COMMERCE
# DIVISION OF REAL ESTATE

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## REAL ESTATE ADMINISTRATIVE RULES

November 2006

**ADMINISTRATIVE RULES**

(e) Having keys made for listed properties; and *6/24/92*

(f) Securing public records from the County Recorders' Offices, zoning offices, sewer districts, water districts, or similar entities. *3/3/94*

6.2.14.1. If personal assistants are compensated for their work, they shall be compensated at a predetermined rate which is not contingent upon the occurrence of real estate transactions. Licensees may not share commissions with unlicensed persons who have assisted in transactions by performing the services listed in this rule. *9/14/92*

6.2.14.2. The licensee who hires the unlicensed person will be responsible for supervising the unlicensed person's activities, and shall ensure that the unlicensed person does not perform activity which requires a real estate license. *9/14/92*

6.2.14.3. Unlicensed individuals may not engage in telephone solicitation or other activity calculated to result in securing prospects for real estate transactions, except as provided in R162-6.2.14.(a) above. *9/14/92*

6.2.15. Fiduciary Duties. A principal broker and licensees acting on his behalf owe the following fiduciary duties to the principal: *11/15/93*

6.2.15.1. Duties of a seller's or lessor's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the seller or the lessor owe the seller or the lessor the following fiduciary duties: *4/23/98*

(a) Loyalty, which obligates the agent to act in the best interest of the seller or the lessor instead of all other interests, including the agent's own; *4/23/98*

(b) Obedience, which obligates the agent to obey all lawful instructions from the seller or lessor; *4/23/98*

(c) Full disclosure, which obligates the agent to tell the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction; *4/23/98*

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the seller or lessor which would likely weaken the seller's or lessor's bargaining position if it were known, unless the agent has permission from the seller or lessor to disclose the information. This duty does not require the agent to withhold any known material fact concerning a defect in the property or the seller's or lessor's ability to perform his obligations; *4/23/98*

(e) Reasonable care and diligence; *11/15/93*

(f) Holding safe and accounting for all money or property entrusted to the agent; and*11/15/93*

(g) Any additional duties created by the agency agreement. *11/15/93*

6.2.15.2. Duties of a buyer's or lessee's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the buyer or lessee owe the buyer or lessee the following fiduciary duties: *4/23/98*

(a) Loyalty, which obligates the agent to act in the best interest of the buyer or lessee instead of all other interests, including the agent's own; *4/23/98*

(b) Obedience, which obligates the agent to obey all lawful instructions from the buyer or lessee; *4/23/98*

(c) Full Disclosure, which obligates the agent to tell the buyer or lessee all material information which the agent learns about the property or the seller's or lessor's ability to perform his obligations; *4/23/98*

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the buyer or lessee which would likely weaken the buyer's or lessee's bargaining position if it were known, unless the agent has permission from the buyer or lessee to disclose the information. This duty does not permit the agent to misrepresent, either affirmatively or by omission, the buyer's or lessee's financial condition or ability to perform; *4/23/98*

(e) Reasonable care and diligence; *11/15/93*

(f) Holding safe and accounting for all money or property entrusted to the agent; and *11/15/93*

(g) Any additional duties created by the agency agreement. *11/15/93*

6.2.15.3. Duties of a limited agent. A principal broker and licensees acting on his behalf who act as agent for both seller and buyer, or lessor and lessee, commonly referred to as "dual agents," are limited agents since the fiduciary duties owed to seller and to buyer, or to lessor and lessee, are inherently contradictory. A principal broker and licensees acting on his behalf may act in this limited agency capacity only if the informed consent of both buyer and seller, or lessor and lessee, is obtained. *4/23/98*

6.2.15.3.1. In order to obtain informed consent, the principal broker or a licensee acting on his behalf shall clearly explain to both buyer and seller, or lessor and lessee, that they are each entitled to be represented by their own agent if they so choose, and shall obtain written agreement from both parties that they will each be giving up performance by the agent of the following fiduciary duties: *4/23/98*

(a) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that they are giving up their right to demand undivided loyalty from the agent, although the agent, acting in this neutral capacity, shall

advance the interest of each party so long as it does not conflict with the interest of the other party. In the event of conflicting interests, the agent will be held to the standard of neutrality; and *4/23/98*

(b) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that there will be a conflict as to a limited agent's duties of confidentiality and full disclosure, and shall explain what kinds of information will be held confidential if told to a limited agent by either buyer or seller, or lessor and lessee, and what kinds of information will be disclosed if told to the limited agent by either party. The limited agent may not disclose any information given to the agent by either principal which would likely weaken that party's bargaining position if it were known, unless the agent has permission from the principal to disclose the information; and

*4/23/98*

(c) The principal broker or a licensee acting on his behalf shall explain to the buyer and seller, or lessor and lessee, that the limited agent will be required to disclose information given to the agent in confidence by one of the parties if failure to disclose the information would be a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill their obligations. *4/23/98*

(d) The Division and the Commission shall consider use of consent language approved by the Division and the Commission to be informed consent. *11/15/93*

6.2.15.3.2. In addition, a limited agent owes the following fiduciary duties to all parties: *4/23/98*

(a) Obedience, which obligates the limited agent to obey all lawful instructions from either the buyer or the seller, lessor and lessee, consistent with the agent's duty of neutrality; *4/23/98*

(b) Reasonable care and diligence; *11/15/93*

(c) Holding safe all money or property entrusted to the limited agent; and *11/15/93*

(d) Any additional duties created by the agency agreement. *11/15/93*

6.2.15.4. Duties of a sub-agent. A principal broker and licensees acting on his behalf who act as sub-agents owe the same fiduciary duty to a principal as the brokerage retained by the principal. *11/15/93*

**R162-7. Enforcement.**

**R162-7-1. Filing of Complaint.**

7.1. An aggrieved person may file a complaint in writing against a licensee; or the Division or the Commission may initiate a complaint upon its own motion for alleged violation of the provisions of

Tab 2

IN THE FIFTH DISTRICT COURT FOR
WASHINGTON COUNTY, STATE OF UTAH

| | |
|---|---|
| GILBERT DEVELOPMENT CORPORATION,<br><br>Plaintiff,<br><br>vs.<br><br>WARDLEY CORPORATION, et al.,<br><br>Defendants. | MEMORANDUM DECISION AND ORDER RE AWARD OF ATTORNEYS' FEES AND COSTS<br><br>Civil No. 030501128<br>Judge G. Rand Beacham |

This matter now comes before the Court upon the "Bill of Costs" and the "Request for Attorneys' Fees" filed by defendants Wardley Corporation, Terry LoCicero, Don Grymes, Lloyd Melling, and Chad Riddle (collectively the "Defendants"), who were the remaining defendants when this case reached jury trial last year. Defendants' claims for fees and costs are vigorously disputed by Plaintiff. The Court has heard oral arguments and has reviewed the papers and authorities filed in support of and in opposition to Defendants' claims.

This case began with a complaint filed in this Court on June 5, 2003, after a change of venue from another court. Plaintiff named ten different defendants, including all the Defendants who went to trial. Plaintiff sought judgment of more than $6,000,000 against these Defendants. Plaintiff's claims were all based upon or dependent upon a written Listing Agreement involving Plaintiff and Defendants, which provided, with one inapplicable exception: "[I]n case of the employment of an attorney in any matter arising out of this Listing Agreement, the prevailing party shall be entitled to receive from the other party all costs and attorney fees, whether the matter is resolved through court action or otherwise."

Some of Plaintiff's claims were resolved in Defendants' favor prior to trial. At the conclusion of the seven-day jury trial, the jury found in favor of Defendants on all remaining claims.

Clearly, Defendants are the prevailing party and are "entitled to receive from [Plaintiff] all costs and attorney fees" according to the bargain made in the Listing Agreement.[1] It is the Court's responsibility to enforce the fees-and-costs provision of the Listing Agreement, just as it would enforce any other provision of the Listing Agreement.

HOURS REASONABLY EXPENDED BY DEFENDANTS' ATTORNEYS

Defendants' Request for Attorneys' Fees is supported by an Affidavit of Attorneys' Fees and Costs signed by their lead attorney, Matthew L. Lalli. Attached to the Affidavit is a 61-page printout listing work and cost descriptions and dollar amounts claimed. The Affidavit lists the names of all persons in Mr. Lalli's law firm who worked on Defendants' case, the total hours for each person, and a total dollar amount of $338,390. Defendants' Request is also supported by the Affidavit of Russell S. Mitchell, with similar records, describing work done by Defendants' original attorneys and claiming a total dollar amount of $61,146. Except for the issue of transition between firms, Plaintiff has not separately challenged Mr. Mitchell's portion of Defendants' Request, so it will not be separately discussed herein. Plaintiff challenges the hours reported and claimed by Defendants' attorneys in five respects:

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[1]The parties to the Listing Agreement were Plaintiff and "Wardley Better Homes and Gardens," a business owned and operated by defendant Wardley Corporation. The four individual defendants were officers and/or employees of Wardley Corporation, and Plaintiff has not challenged or separately treated these defendants' claims for fees and costs pursuant to the provision of the Listing Agreement.

1. Project Assistants and IT Department. The Affidavit of Attorneys' Fees lists two persons as "Proj. Assist." and one person as "IT Dept." Plaintiff challenges charges for the work of these persons, asserting that these are a part of the "standard overhead in any law firm" and not what could be deemed to be "attorneys' fees." In argument, Mr. Lalli explained that a "project assistant" is a paralegal. While there are some circumstances in which this Court does not award paralegal fees, the use of paralegals has been recognized for many years as a desirable practice in litigation and other legal work, to promote efficiency and thrift and to limit both the hours spent and the hourly rates charged by attorneys. Paralegals generally do work that attorneys could do and might have done in past decades, but at a lower cost. The paralegals' fees claimed by Defendants' are not part of their counsel's overhead, and may be awarded as part of attorneys' fees. Mr. Lalli also explained in argument the IT[2] person assisted with preparation of the "electronic presentation" used in the trial. While that presentation was well-done and very effective, it appears to me to be too far removed from the work that attorneys have traditionally done to be included as "attorneys' fees." Consequently, the charge of $1625 for thirteen hours of work will be deducted from Defendants' claim for fees.

2. Apportionment of Contract and Non-Contract Issues. Defendants acknowledge that Plaintiff's complaint brought several causes of action against them, including "contractual and non-contractual claims." Plaintiff asserts that Defendants have not separated "compensable and non-compensable claims" sufficiently to allow the Court to award them their attorneys fees. Defendants

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[2]I assume this is the well-known abbreviation for "Information Technology."

argue that all of Plaintiff's claims involved the same set of facts, and that argument is factually correct. All of Plaintiff's claims were based on the Listing Agreement and on theories of liability which depended on the Listing Agreement. For example, Plaintiff could not claim any defendant had a fiduciary duty to him independent of the fact that he had accepted the Listing Agreement. Similarly, Plaintiff could not make a claim based on an implied covenant of good faith and fair dealing without having the Listing Agreement into which such covenant could be implied. Plaintiff's causes of action were simply different theories of recovery based on the same set of facts. Under these circumstances, Defendants are not required to account separately for the time spent by each of ten persons on each of Plaintiff's several causes of action over the course of five years of litigation.

3. Transition Between Law Firms. Defendants' original counsel withdrew at an early point in this litigation and was replaced by Defendants' trial counsel. Plaintiff objects to being required to pay attorneys' fees incurred in that transition, but he also acknowledges that Defendants' records show that they are not making a claim for the time spent by their former counsel "on transition related items." Plaintiff simply speculates that Defendants' claims must include some duplication of work, or some work on other cases. The Court finds Defendants' records and explanations to be sufficient to overcome speculation in this regard.

4. Summary Judgment Motion. In the course of this litigation, Defendants filed a motion for summary judgment which was heard and denied by this Court. Plaintiff asserts that Defendants cannot claim attorney fees for a failed motion for summary judgment because Defendants did not "prevail" on that motion. The Court finds Plaintiff's argument to be based on

an excessively narrow concept of the summary judgment process. Summary judgment is an ordinary procedure in the litigation of any civil matter and in the preparation of a civil case for trial. Avoiding trial by obtaining summary judgment, however, is only one proper objective of a summary judgment motion. Such a motion, if done competently, may produce important evidence even if it is denied. A summary judgment motion may test the resolve of an opposing party, the party's understanding of the legal issues, and the party's command of the facts, regardless of whether it is granted or denied.[3] A summary judgment motion may reveal facts and issues that were previously unnoticed by the moving party and thus be valuable in negotiation and in trial preparation. Accordingly, a summary judgment motion that is denied is not necessarily a failure, and failing to "prevail" on a summary judgment motion is not properly considered to be a reason to deny attorneys' fees to a party who ultimately prevails.[4] The real issue is whether the time spent by Defendants on their summary judgment motion was reasonable, and the fact that the Court ruled that the issues should go to a jury is not evidence that the motion was unreasonable. Having heard the summary judgment motion as well as having conducted the jury trial of this case, and having studied summary judgment practice for nearly three decades, this Court finds both Defendants' motion and the time spent by their counsel on the motion to be reasonable in a case of this magnitude.

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[3]In my own practice, I considered a summary judgment motion to be an effective discovery tool for forcing a recalcitrant opposing party either to produce information or to suffer the consequences of stonewalling.

[4]Some appellate courts who, due either to (a) limited experience in litigation practice or to (b) little or no experience in the trial courts, are apparently unacquainted with the proper uses of summary judgment motions make mistakes in this regard when they assume that the only way to "prevail" is to win every point in every argument and every motion.

5. Mock Trial. Part of Defendants' counsel's preparation for trial involved preparing for and conducting a mock trial. Plaintiff asserts that Defendants are claiming some $45,669[5] for fees related to this mock trial and that such claim is unreasonable. Defendants assert that they already wrote off some fees related to the mock trial and that the fees for the day of the trial were only $2066.37.[6] Regardless of the obvious utility of a mock trial in preparation for any jury trial involving difficult issues, it is not usual or typical in this Court's experience for a prevailing party to claim fees for having prepared in this manner. The trial in this case was superbly conducted by both sides, however, with Defendants prevailing in the jury's verdict. The unusually high intensity of the conflict between the parties and the large amount in controversy justified—even necessitated—more than usual trial preparation. I have presided over many jury trials which would have been improved by better preparation, including perhaps a mock trial, because preparation for a mock trial would also improve preparation for jury trial. I find that the mock trial used by Defendants' counsel to prepare in this case clearly aided in their preparation for the long, difficult jury trial and was a reasonable investment of time.

6. Plaintiff's Vigorous Prosecution of Claims. One interesting issue has to do with the extent to which Plaintiff employed multiple attorneys in the prosecution of its claims and the relevance, if any, of Plaintiff's vigorous prosecution to the reasonableness of Defendants' request

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[5]Plaintiff's calculation is clearly incorrect, since many time entries which mention "mock trial" also mention work unrelated to the mock trial.

[6]This figure is clearly too limited, because Defendants' counsel's records show more than a dozen individual entries relating to "mock trial."

for attorneys' fees. As the losing party, Plaintiff has not been required to disclose its own attorneys' hours and charges. Without detailed information from Plaintiff, Defendants noted in their initial memorandum that "while the one plaintiff in this case (Gilbert) was primarily represented by three attorneys throughout discovery and trial of this matter . . . the five defendants in this case were primarily represented by one attorney . . . in discovery, and two attorneys . . . at trial." This comparison of "manpower," though factually accurate, apparently struck a nerve with Plaintiff, whose response calls the comparison "unhelpful"[7] and implies that Plaintiff's own spending on attorneys' fees is irrelevant to the reasonableness of Defendants' attorneys fees because it is not a *Dixie State Bank* factor. In their reply memorandum, Defendants' then flesh out their point, referring to Plaintiff as "a well-financed and relentless plaintiff, represented by in-house counsel and two partners from one of the state's largest and most respected law firms," which Defendants describe as "heavy artillery." In both of their memoranda, Defendants note that Plaintiff's Second Supplemental Rule 26 Disclosures stated that Plaintiff's own attorneys fees for this case totaled $275,150 as of May 2006. In the opinion of this Court, it is entirely relevant to observe that, nearly two years before trial, Plaintiff had already incurred fees equal to 69% of Defendant's fees for the entire litigation through the jury trial. Plaintiff does not argue that either the time spent or the fees charged by its own attorneys to vigorously prosecute its claims were unreasonable, and the Court finds no fault with Plaintiff in its vigorous prosecution and finds that Plaintiff was very well represented. This Court also finds, however, that evidence of Plaintiff's investment of time and

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[7]Conversely, however, Plaintiff later argues that some of the work done for Defendants was "overstaffed" with attorneys.

resources in this case is entirely relevant to the question whether it was reasonable for Defendants' attorneys to spend significant time and resources to defeat Plaintiff's claims.

Having reviewed all the information provided by the parties, the Court finds that the time spent by Defendants' attorneys was reasonable, except as stated above.

REASONABLE HOURLY RATE

Determining a reasonable hourly rate for attorneys' services is an issue on which the appellate courts have been unusually vague. The usual statement by an appellate court is, for example, that the rate must be what is "customarily charged in the relevant community." So far as the parties have disclosed to this Court, however, no appellate court has disclosed how "the relevant community" is to be determined.

Defendants' attorneys' affidavits recite that some of the attorneys' hourly rates "were specifically discounted for this action" and that all hourly rates charged "are consistent with rates charged in this locality," without identifying that locality. Plaintiff relies on Utah cases using such terms as "other local attorneys' rates" and "in the locality" and assumes that this means the city in which this Court is located. Accordingly, Plaintiff concludes that the only reasonable hourly rates for litigation in this "locality" are those charged by attorneys whose offices are located in St. George, Utah—even though Plaintiff's two primary attorneys do not have their offices in that "locality."[8] Defendants' reply memorandum identifies the logical fallacy in Plaintiff's argument: If "the

[8]Fortunately for Plaintiff's argument, Plaintiff is not required to explain what its position would be if it had been the prevailing party and it were seeking, as it has during this entire case, an award of the attorneys' fees it has paid to Salt Lake City counsel.

locality" in which attorneys' hourly rates are relevant and limiting is strictly the location of this Court, then a prevailing party could never recover its attorneys fees without restricting itself to St. George attorneys or attorneys charging St. George rates, regardless of whether the opposing attorneys were from St. George.

This Court does not perceive the appellate courts' vague statements about "locality" and "relevant community" to be a basis for concluding that the appellate courts are imposing a "buy local" philosophy upon a litigating party's choice of counsel. Instead, it is the opinion of this Court that "the locality" to be considered is the general geographic area in which a party litigating in this Court might reasonably look for litigation counsel.

The particular community in which this Court is located, Washington County, is not isolated from the rest of Utah, is neither more wealthy nor more economically distressed than the rest of Utah, and is not less sophisticated about legal matters than the rest of Utah. Residents of this community do not restrict their purchases of goods and services to providers in this community, much to the dismay of local providers. The market for legal services in Washington County is limited only to attorneys who are licensed to practice in Utah, and this Court considers "the relevant community" to be the State of Utah for determining whether Defendants' attorneys' hourly rates are reasonable.

In addition, the Court should consider "the fee customarily charged" for similar services in the relevant locality or community. This does not mean that the Court is required to base an award on an "average" hourly rate, however. The fee awarded simply must be reasonable in light of all circumstances.

The circumstances affecting the reasonableness of an attorney's hourly rate include the experience and skill of the particular attorneys. All but one of the attorneys participating in this case (the exception being Plaintiff's in-house counsel who, too, is highly competent) are from some of the premier law firms in Utah: (a) Plaintiff's litigation attorneys are from Ray, Quinney & Nebeker; (b) Plaintiff's attorneys on this issue are from Durham, Jones & Pinegar; (c) Defendants' attorneys are from Snell &Wilmer; and (d) Defendants' former attorneys were from Jones, Waldo, Holbrook & McDonough. In the trial and all matters brought before the Court, the work done by all attorneys has been exemplary. The focus, of course, is now on Defendants' attorneys, and the Court observed that their lead attorney, Mr. Lalli, was especially well prepared, professional, skillful, expert, and effective in this case.

Having reviewed all the information provided by the parties, the Court finds no reason to believe that the rates charged by Defendants' attorneys are unreasonable.

AWARD OF ATTORNEYS' FEES

Having fully reviewed the evidence, the Court finds that the work outlined by Defendants' attorneys was actually done by them,[9] that the work was reasonably necessary to present a completely successful defense against Plaintiff's several claims, and that the billing rates shown by Defendants' attorneys are consistent with the rates customarily charged by Utah attorneys with the experience and skill of those who defended in this case. The Court finds that this case was somewhat unusual in its factual and legal complexity and that Plaintiff's vigor in pursuing its case, though entirely

[9]With the one exception for IT Department work, which is excluded.

appropriate, made a vigorous defense necessary. The Court concludes that Defendants' Request for Attorneys' Fees should be granted, with the exception noted above, so that the total award is $397,911.00.

BILL OF COSTS

Defendants' Bill of Costs explains their claim for a total of $82,942.89 in costs incurred by them in this litigation, which the supporting affidavits describe as "necessary and reasonable." Plaintiff objects to several of the claims or amounts.

Plaintiff asserts that the $49,943.00 in costs related to Defendants' mock trial are not shown to have been reasonable. The Court has rejected Plaintiff's argument against Defendants' attorneys fees claim related to the mock trial, but the Court finds the costs to be a different matter. Time spent by attorneys for the prevailing party in preparation for trial, including study, research and training, should be awarded if the time and effort are reasonable and related to the case. If all costs of doing relevant study or research and of obtaining relevant training were automatically chargeable to the losing party, however, it might even be said that those costs include law school tuition and library acquisitions. The costs that Defendants claim in relation to the mock trial include consultant fees, travel, site rental, and recruiting and paying mock jurors. There is no evidence before the Court to show that such costs were reasonable, except a blanket assertion in Mr. Lalli's affidavit. Without evidence showing that such costs were in fact reasonable—e.g., as opposed to conducting a mock trial at one's own offices with volunteer jurors—the Court cannot find these costs to be reasonable. Accordingly, the costs awarded will not include the costs of the mock trial.

Plaintiff also objects to Defendants' claim of $8467,09 for copying and document

reproduction costs. The only charges shown to be directly related to prevailing in this case are for "Preparation of Trial Exhibits" in the amount of $1596.66. The Court finds that all other claims in this category are the usual overhead of a law firm that is covered by attorneys' fees and not the sort of costs that are necessary to prevailing in litigation.

Plaintiff objects to the costs claimed for Defendants' expert, David Johnson. Contrary to Plaintiff's characterization of Mr. Johnson's importance to the case, the Court finds that Mr. Johnson's advice to Defendants' and his testimony at trial were sufficiently necessary to Defendants' success that a reasonable fee should be assessed against Plaintiff. The invoices attached to the Bill of Costs, however, total only $4670.75, and the remainder of this claim is undocumented.

Plaintiff challenges Defendants' claims for the costs of "travel and communications." The Court finds charges for telephones, faxes and postage to be normal overhead expenses like routine photocopies. Reasonable travel costs are an ordinary expense of litigation, however, and may be awarded to a prevailing party. The total awarded in this case is $6216.03.

Finally, Plaintiff objects to being charged with $429.45 for the costs of depositions, because deposition transcripts were not employed at trial. Depositions costs are routinely incurred in trial preparation, however, regardless of whether they are used at trial. In addition, it appears that the two depositions involved in Defendants' claim were taken upon notices given by Plaintiff, so Plaintiff can hardly argue that it was not necessary for Defendants' to incur these costs.

AWARD OF COSTS

Having reviewed all of the evidence before the Court on the subject, the Court finds the following costs to be reasonable and, pursuant to Rule 54(d) of the Utah Rules of Civil Procedure

and Section 8 of the parties' Listing Agreement, awards the total of such costs to Defendants as costs of this litigation:

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|---|---|
| Preparation of Trial Exhibits | $1596.66 |
| Expert Witness | $4670.75 |
| Travel | $6216.03 |
| Depositions | $429.45 |
| TOTAL | $12,912.89 |

CONCLUSION

The Court awards attorneys' fees and costs to Defendants and against Plaintiff in the amounts of $397,911.00 for fees and $12,912.89 for costs, and judgment may be entered for the total of $410,823.89. Defendants' counsel may submit an appropriate judgment.

Dated this 13th day of February, 2009.

G. RAND BEACHAM, JUDGE

CERTIFICATE OF MAILING OR HAND DELIVERY

I hereby certify that on this 18 day of Feb, 2009, I provided true and correct copies of the foregoing MEMORANDUM DECISION AND ORDER to each of the attorneys/parties named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

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DEPUTY CLERK OF COURT